

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's February 19, 2016 reconsideration request pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances from the prior appeal are incorporated herein by reference. The facts relevant to this appeal will be set forth.

On August 12, 1991 appellant, then a 41-year-old aircraft electrician, filed a traumatic injury claim (Form CA-1) alleging that on August 1, 1991 he injured his head, neck, and lower back in the performance of duty. OWCP accepted his claim for migraines, displacement of cervical and lumbar intervertebral discs, impotence, major depression, a crushing injury of the left shoulder and upper arm, and lumbar postlaminectomy syndrome. Following his injury, appellant returned to limited-duty employment until March 8, 1996, when he stopped work and received wage-loss compensation for total disability.⁴

By decision dated October 18, 2011, OWCP terminated appellant's compensation effective October 12, 2011 as he plead guilty to defrauding FECA and consequently was not entitled to further compensation under 5 U.S.C. § 8148.⁵

Appellant, on November 5, 2011, requested an oral hearing.⁶ By decision dated March 28, 2012, an OWCP hearing representative affirmed the October 18, 2011 decision. He determined that the evidence supported that appellant plead guilty to fraud in obtaining workers' compensation.

On March 28, 2014 appellant requested reconsideration.⁷ In a decision dated May 22, 2014, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to

³ Docket No. 15-0301 (issued April 2, 2015).

⁴ By decision dated May 16, 2011, an OWCP hearing representative found an overpayment of compensation in the amount of \$90,747.25 because he submitted inaccurate travel vouchers from August 15, 2003 to June 19, 2010. He was found at fault in the creation of the overpayment as he knew or should have known that he could not claim 300 to 400 miles of travel expenses when he was located only eight to ten miles from his physician's office. The hearing representative found that OWCP should deduct \$350.00 from continuing compensation to repay the overpayment.

⁵ On October 4, 2011 appellant entered into a plea agreement in the U.S. District court for the Eastern Division of Pennsylvania. He plead guilty under 18 U.S.C. § 1920 to 10 counts of making a false statement to obtain workers' compensation benefits, 10 counts of mail fraud under 18 U.S.C. § 1341, 1 count of theft of government funds under 18 U.S.C. § 641 and 1 count of making false statements under 18 U.S.C. § 1001.

⁶ On January 10, 2012 OWCP acknowledged that appellant was represented by counsel.

⁷ On June 3, 2013 appellant appealed to the Board. The Board issued an order dismissing his appeal on July 18, 2013 as it was not made within 180 days of the March 28, 2012 decision. *Order Dismissing Appeal*, Docket No. 13-1450 (issued July 18, 2013).

demonstrate clear evidence of error. It found that he had not demonstrated any error in the March 28, 2012 decision.

Appellant appealed to the Board. In a decision dated April 2, 2015, the Board affirmed the May 22, 2014 decision.⁸ The Board found that, as his March 28, 2014 request for reconsideration was received more than one year after the last merit decision dated March 28, 2012 and as such was untimely. The Board further determined that appellant had not raised a substantial question regarding the correctness of OWCP's decision and thus had failed to demonstrate clear evidence of error.

On February 19, 2016 appellant requested reconsideration. He argued that OWCP should reinstate his compensation and advised that he was in treatment for prescription drug addiction. Appellant specified his doctor as his representative.⁹ He submitted medical evidence in support of his request.

In a decision dated May 19, 2016, OWCP denied appellant's request to reopen his case for further review of the merits of his claim under section 8128(a) as he had not shown that it erred in applying or interpreting a point of law, raised a relevant legal argument not previously considered, or submitted relevant and pertinent new evidence.

On appeal appellant maintains that he requires pain medication and describes his difficulties with the activities of daily living.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”¹⁰

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that

⁸ *Supra* note 3.

⁹ Appellant was already represented by counsel and did not indicate that he was withdrawing authorization for counsel. OWCP's regulations provide, “There can be only one representative at any one time, so after one representative has been properly appointed, OWCP will not recognize another individual as representative until the claimant withdraws the authorization of the first individual.” 20 C.F.R. § 10.700(b).

¹⁰ 5 U.S.C. § 8128(a).

an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹

OWCP should review the file to determine whether the application for reconsideration was received within one year of a merit decision. Timeliness is determined by the document receipt date of the reconsideration request the received date in the Integrated Federal Employees' Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹²

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹³

The term clear evidence of error is intended to represent a difficult standard.¹⁴ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁵

ANALYSIS

The Board finds that the case must be remanded to OWCP to apply the appropriate standard to appellant's untimely request for reconsideration. The most recent decision reviewing the merits of appellant's claim was OWCP's March 28, 2012 decision. Appellant requested reconsideration of the March 28, 2012 decision on March 28, 2014. In a decision dated May 22, 2014, OWCP denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. On appeal the Board, in a decision dated April 2, 2015, affirmed the May 22, 2014 decision.

Appellant on February 19, 2016 again requested reconsideration. By decision dated May 19, 2016, OWCP applied the standard applicable to timely requests for reconsideration and denied his request after finding that he had failed to submit evidence or raise an argument sufficient to warrant reopening the case for further merit review under section 8128. As the last merit decision in this case was issued on March 28, 2012, appellant's February 16, 2016 request for reconsideration was untimely. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the

¹¹ 20 C.F.R. § 10.607(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (February 2016).

¹³ 20 C.F.R. § 10.607.

¹⁴ *Supra* note 12 at Chapter 2.1602.5.a (February 2016).

¹⁵ *Id.* at Chapter 2.1602.5.b.

¹⁶ *Supra* note 11.

issues.¹⁷ OWCP's procedures provide that timeliness is determined by the date that the request is received by OWCP and that if the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹⁸ As appellant's request for reconsideration was untimely, OWCP erroneously reviewed his request for reconsideration using the standard for timely reconsideration requests.¹⁹ The Board will, consequently, remand the case for application of the proper standard, to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 6, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁸ *See supra* note 10.

¹⁹ *See L.D.*, Docket No. 15-0865 (issued October 6, 2015); *H.L.*, Docket No. 13-2077 (issued March 20, 2014).